IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 877 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BAKABHAI @ DASHRATHBHAI KACHRABHAI PRAJAPATI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MOHANBHAI DESAI for Appellant(s) : 1 - 2.
MR KP RAWAL APP for Opponent(s) : 1,
MR YN RAVANI for original complainant.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 12-13/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellants have preferred this appeal

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment and order dated 31-7-1999 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 138 of 1998, convicting appellant Bakabhai @ Dashrathbhai Kacharabhai for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.500/-, in default thereof, to undergo simple imprisonment of two months and also convicting appellant Rajeshbhai Kacharabhai for the offence punishable u/s 324 of the I.P. Code and sentencing him to undergo rigorous imprisonment for one year and four months and to pay fine of Rs.500/-, in default, to undergo simple imprisonment for one week. The trial Court also ordered to pay compensation of Rs.2,500/- to complainant Shakarabhai Madhabhai out of the amount of fine if paid by appellant Bakabhai @ Dashrathbhai.

2. In brief, the prosecution case was that complainant Shakarabhai Madhabhai Prajapati was residing at Prajapati Vas in village Balva, Taluka Kalol with his wife Kamuben and three sons; deceased Bharatbhai, Ashokhai and Keshabhai. The appellants were the sons of accused Kacharabhai Mangabhai who was the cousin brother of complainant Shakarabhai. The

appellants their father accused Kacharabhai Mangabhai and mother accused Jadiben Kacharabhai were residing near the house of complainant. As complainant was doing masonry work, he had kept a wooden log near the ward (maholla) on 22-3-1998 at about 5-00 p.m. The appellants, accused Kacharabhai Mangabhai, accused Bhikhabhai Mangabhai and others objected to putting up the wooden log saying that why the wooden log was kept in the middle of the road and requested to remove the same. Therefore, complainant removed the wooden log. On 23-3-1998 at about 5-00 p.m. when the complainant, his wife Kamuben and his son Bharatbhai were at their house, appellant Bakabhai @ Dashrathbhai Kacharabhai and appellant Rajeshkumar Kacharabhai with axes, accused Kacharabhai Mangabhai with wooden log and accused Bhikhabhai Mangabhai with stick came to their house abusing them. Complainant told them not to give abuses which enraged them. Appellant Bakabhai @ Dashrathbhai Kacharabhai inflicted axe blows on the head, wrist and back of Bharatbhai. The complainant and his wife intervened, so accused Bhikhabhai Mangabhai gave kick and fist blows to the complainant and appellant Rajeshbhai gave axe blow on right hand of Kamuben. Others were instigating the accused. Bharatbhai was profusely bleeding and people assembled there on

account of shouts. One Dahyabhai Kacharabhai Raval also intervened. Initially injured Bharatbhai, Kamuben and the complainant took treatment at General Hospital, Gandhinagar. Thereafter, injured Bharatbhai and Kamuben were shifted to Civil Hospital, Ahmedabad for treatment. Injured Bharatbhai succumbed to his injuries on 1-4-1998 in the hospital during the treatment.

3. The record indicates that the injured went to General Hospital, Gandhinagar for treatment immediately after the incident and the police constable P.W. 22 Bhupatsinh Hemtuji at General Hospital, Gandhinagar under the instructions from the Doctor gave 'Vardhi' Exh. 59 on 23-3-1998 to send Investigating Officer to Civil Hospital, Ahmedabad where the injured were transferred for treatment and also to inform Kalol Taluka Police Station about the incident. P.W. 14 Nasirkhan Motekhan Pathan received order Exh.38 at 21-00 hours to carry out further investigation. It appears from order Exh. 38 that P.W. 22 Bhupatsinh gave 'Vardhi' Exh. 59 at 20-00 hours. Pursuant to that complaint of Shakarabhai was recorded as First Information Report No. 76/98 on 24-3-1998 for the offences punishable under Sections 147, 148, 149,307, 326, 323 and 504 of the I.P. Code and the investigation was

started. As injured Bharatbhai died during the treatment Section 302 of the I.P. Code was added. During the course of the investigation, statement of the witnesses were recorded. Panchanama of scene of offence, inquest panchanama and panchanama of recovery of muddamal articles were drawn. Dead body of Bharatbhai was sent for postmortem. The accused were arrested.

4. On completion of the investigation, charge sheet was laid before the the Court of the learned Judicial Magistrate, First Class, Kalol, for the offence punishable under Sections 302 and 324 of the I.P. Code. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Mehsana and it was registered as Sessions Case No. 138 of 1998. Learned Additional Sessions Judge, Mehsana framed charge Exh. 5 against the accused for the offences punishable u/ss 147, 148 and 302 read with Section 149 of the I.P. Code, under Sections 326, 325 and 324 read with Section 149 of the I.P.Code, and 504 read with Section 149 of the I.P.Code. The charge was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against

accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing them. The accused explained the incriminating evidence in their further statement recorded under Section 313 of the Code of Criminal Procedure, 1973.

5. Appellant Bakabhai @ Dashrathbhai in his further statement stated that at the time of incident he was at his house, that he heard shouts of his father Kacharabhai Mangabhai and mother Jadiben to rescue them and on hearing shouts, he went near their 'Pangalla'; that at that time Bharatbhai, Ashokbhai, Shakarabhai and Kamuben had attacked his father; therefore, he tried to rescue his father and mother by moving round the axe as he apprehended that they will kill his father and mother.

6. Appellant Rajeshbhai Kacharabhai in his further statement stated that he was not at home at the time of the incident.

7. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge acquitted appellant Bakabhai @ Dashrathbai Kacharabhai for the offence punishable u/ss 147, 148, 149, 326, 324

and 504 of the I.P. Code but found him guilty for the offence punishable u/s 302 of the I.P. Code. Similarly, appellant Rajeshbhai Kacharabhai was acquitted for th offence punishable u/s 147, 148, 149, 302, 326, 325 and 504 of the I.P. Code but fond him guilty for the offence punishable under Section 324 of the I.P. Code and convicted and sentenced them to undergo the sentence as mentioned hereinabove. The other accused were acquitted for the offences charged against them. The accused who have been convicted have preferred the present appeal.

8. It may be recorded that accused Kacharabhai Mangabhai had also filed a complaint before Kalol Taluka Police Station, Kalol against present complainant Shakarabhai Madhabhai, deceased Bharatbhai Shakarabhai, Ashokbhai Shakarabhai and Kamuben Shakarabhai on 24-3-1998 alleging that on 23-3-1998 when he was sitting on his 'galla' Bharatbhai Shakarabhai with stick, Ashokbhai Shakarabhai with iron rod and Shakarabhai Madhabhai with wooden log came to him and told him that why he has kept 'galla' in the middle of the road as the place belongs to panchayat; that he asked them not to give abuses and so they got enraged. It is further alleged that Bharatbhai inflicted stick blow on his head and Ashokbhai inflicted iron rod blow on left hand

and Kamuben Shakarabhai also came there and started giving abuses and Bharatbhai gave stick blow on left hand of his wife Jadiben. It is further alleged that his cousin brother Natvarbhai who tried to intervene was also injured and that all of them gave threats to kill and the incident occurred between 5-00 and 5-30 in the evening on 23-3-1998 at the entrance of their ward.

9. The said complaint was registered as II CR No.98 of 1998 before Kalol Taluka Police Station, Kalol and investigation was started. On completion of the investigation charge sheet was laid before the Judicial Magistrate, First Class, Kalol against accused Ashokbhai Shakarabhai, Shakarabhai Madhabhai and Kamuben Shakarabhai for the offence punishable under Section 323, 325, 504, 506(2) read with Section 114 of the I.P. Code. Treating the case as cross-case of the present case, the said case was also committed to the Sessions Court, Mehsana and it was registered as Sessions Case No. 64 of 1999 and it was tried with Sessions Case No. 138 of 1998. In Sessions Case No. 64 of 1999 the accused and present complainant Shakarabhai and his wife Kamuben were acquitted but accused Ashokbhai Shakarabhai was convicted for the offence punishable u/s 323 of the I.P. Code. Accused

Ashokbhai Shakarabhai also preferred Criminal Appeal No. 863 of 1999. The complainant in the said case also preferred Criminal Revision Application No. 529 of 1999 against the acquittal of Shakarabhai and Kamuben in the said proceedings. Both the cases have been heard with this appeal.

10. It is also required to be recorded that State preferred Criminal Appeal No. 905 of 1999 against acquittal of accused Kacharabhai Mangabhai, Bhikhabhai Mangabhai and Jadiben in Sessions Case No. 138 of 1998. The complainant in the said case also preferred Criminal Revision Application No. 457 of 1999 against the said acquittal order. Criminal Appeal No. 905 of 1999 and Criminal Revision Application No. 457 of 1999 have been dismissed by the High Court by order dated 6-10-1999.

11. In view of above facts, it becomes clear that two offences were registered in respect of the incident that occurred between 5-00 and 5-30 p.m. on 23.3.1998.

12. We have heard the learned advocate Mr. M.S. Desai, for the appellants and learned A.P.P. Mr. K.P. Rawal for the respondent – State and

learned advocate Mr. Y.N. Rawani for the original complainant at length and in great detail. We have also perused the judgment of the trial court as well as the record and proceedings of the case.

13. Learned advocate Mr. Desai for the appellants submitted that the place of the incident is not near to the house of the complainant as alleged by the prosecution but the incident occurred near 'panshop' which is at the entrance of the ward where the complainant and others attacked Kacharabhai. Therefore, the scene of offence has been shifted by the prosecution. He submitted that the injuries caused to victims were caused in self-defence as the appellant Bakabhai @ Dashrathbhai apprehended that the attackers would kill his father and mother. He also submitted that the medical evidence indicates that the injuries caused to Bharatbhai can be caused by moving round axe in self defence, and therefore, there was no intention on the part of appellant Bakabhai @ Dashrathbhai to cause bodily injuries as were likely to cause death. He, therefore, submitted that appellant Bakabhai @ Dashrathbhai could not have been convicted for the offence of murder. He also submitted that in the first 'Vardhi' given to the police the name of six persons were given.

There is discrepancy about the nature of weapons held by the appellants and other accused and there is no evidence to indicate that appellant Rajeshbhai inflicted the injuries as alleged by the prosecution. The complaint is filed after about 17 hours of the incident. There is variance between the complaint and oral evidence with regard to the incident. Therefore, conviction qua appellant Rajeshbhai requires to be set aside and the conviction of appellant Bakabhai @ Dashrathbhai is required to be altered to Section 304 Part-I or Part-II of the I.P.Code as the death was caused without premeditation and in exercise of right of private defence.

14. While opposing the appeal, the learned A.P.P. Mr. Rawal submitted that there were number of injuries on Bharatbhai and looking to these injuries it cannot be said that the same were inflicted in exercise of right of private defence. The place of the incident is near to the house of the complainant. There is no evidence to indicate that the complainant and others attacked accused Kacharabhai and appellant Bakabhai caused the injuries while trying to rescue his father. On the contrary, looking to the nature of the injuries sustained by deceased Bharatbhai, it can very well be said that the injuries were inflicted with

premeditation. He also submitted that ocular evidence indicates involvement of the appellants in the offence and delay in lodging the complaint is not fatal to the prosecution case as the deceased and injured were immediately shifted to Civil Hospital, Ahmedabad for treatment. Therefore, the learned trial Judge was justified in recording the conviction and the appeal is required to be dismissed.

15. Learned advocate Mr. Y.N. Ravani appearing for the original complaint adopted the arguments advanced by the learned A.P.P.

16. In view of the submissions made by the learned advocate for the appellants, it is required to be examined as to whether there were two separate incidents occurred in quick succession and with regard to conviction of appellant Bakabhai @ Dashrathbhai as to whether appellant Bakabhai @ Dashrathbhai Kacharabhai acted in exercise of right of private defence as the appellant has not disputed his presence and occurrence of the incident.

17. The record indicates that immediately after the incident injured Bharatbhai and Kamuben went to General Hospital, Gandhinagar for treatment. The prosecution produced the certificate of

injured Bharatbhai Shakarabhai Prajapati and Kamuben Shakarabhai Prajapati at Exh.18 and Exh. 19 respectively. The certificates indicate that Bharatbhai Shakarabhai was admitted in the Hospital at 6-15 p.m. and Kamuben Shakarabhai was admitted at 6-20 p.m. on 23-3-1998. The certificates also indicate that both the injured were transferred to Civil Hospital, Ahmedabad at 7-20 p.m. on the same day.

18. The prosecution also produced 'Vardhi' Exh.59 recorded in the Medico Legal Case Register given by the police on duty at the hospital to the police station informing about the incident. It indicates that Head-Constable Bhupatsingh Hematuji under the instruction of Dr. A.L. Patel of Civil Hospital, Gandhinagar (In fact, it was General Hospital, Gandhinagar) gave 'Vardhi' that Bharatbhai Shakarabhai and Kamuben Shakarabhai were shifted to Civil Hospital, Ahmedabad for further treatment after giving them preliminary treatment as appellant Bakabhai @ Dashrathbhai caused injuries by axe on the head and hand of Bharatbhai Shakarabhai, accused Kacharabhai and appellant Rajeshkumar caused injuries to Kamuben by stick blows on her hand and back. It also indicates that accused Jadiben Kacharabhai, Bhikhabhai Mangalbhai and Bhikhabhai Prajapati

gave kicks and stick blows to Kamuben and were brought to Hospital by Shakarabhai Madhabhai. It further indicates that injured Bharatbhai was serious and therefore request was made to make arrangement to record his dying declaration by informing Shahibaug Police Station and also to inform Kalol Taluka Police Station about 'Vardhi'. In view of this evidence it becomes clear that immediately after incident the injured went to General Hospital, Gandhinagar and police was informed about the incident wherein details like the names of the persons involved in the incident, weapons held by them and role attributed by them were given. The prosecution also produced order Exh. 38 given to P.W. 14 Nasirkhan Exh. 37 at Kalol Police Station to make investigation in the incident. P.W. 14 Nasirkhan Motekhan Exh. 37 on receipt of order Exh. 38 at 21-00 hours on 23-3-1998 went to Civil Hospital, Ahmedabad on 24-3-1998 and recorded complaint Exh. 39 given by Shakarabhai Madhabhai.

19. In view of above, immediately after admission of the injured in Gandhinagar Hospital P.W. 2 Dr. Amrutlal L. Patel Exh. 17 informed the police about the incident.

20. The prosecution examined P.W. 22 Bhupatsinh

Hemtuji Exh. 58 to prove 'Vardhi' Exh. 59. The evidence of this witness indicates that at about 7-30 p.m. on 23-3-1998 'Vardhi' Exh.59 was given by P.W. 2 Dr. A.L. Patel and it was recorded in the M.L.C. (Medico Legal Case) Register by him. Injury certificates Exh. 18 and 19 indicate that the injured were admitted in the hospital at 6-15 p.m. and 6-20 p.m. respectively on 23-3-1998. The evidence of the doctor P.W. 2 Dr. A.L. Patel Exh. 17 who gave preliminary treatment to injured also indicates that he informed the police about the incident and on receiving such information P.W. 22 Bhupatsinh Exh. 58, went to the hospital and obtained preliminary information about the incident from injured Bharatbhai and made entry Exh. 59 in the Medico Legal Case Register. Thereafter on the basis of order Exh. 38 P.W. 14 Nasirkhan Motekhan Exh. 37 went to Civil Hospital, Ahmedabad and recorded complaint Eh. 39 given by Shakarabhai Madhabhai on 24-3-1998. The complaint indicates that on 22-3-1998 at about 5-00 p.m. the complainant had kept a wooden log near their ward which was objected to by the appellants and the other accused who were residing near the house of the complainant and also requested him to remove the wooden log. Therefore, the same was removed. The complaint further indicates that keeping grudge of

this, on 23-3-1998 at about 17-00 hours when complainant, his wife Kamuben and son Bharatbhai were present at the house, appellants Bakabhai @ Dashrathbhai and Rajeshkumar Kacharabhai with axe, accused Kacharabhai Mangabhai with wooden log and accused Bhikhabhai Mangaldas with stick came there and started giving abuses and as they were told not to give abuses, the accused enraged and appellant Bakabhai @ Dashrathbhai gave one axe blow on head, one blow on right wrist and one blow on back of Bharatbhai. As the complainant and his wife Kamuben shouted and tried to intervene accused Bhikhabhai gave stick and kick blows and appellant Rajeshkumar inflicted axe blow on the right hand of Kamuben. The complaint further indicates that Bharatbhai was severely injured and was bleeding and other were instigating the accused. The accused ran away as people assembled there on account of shouts and one Dahyabhai Kacharabhai Raval also intervened.

21. In view of this evidence it becomes that P.W.14 Nasirkhan was given order Exh. 38 for investigation recorded at 20-00 hours on 23-3-1998 which he received at 21-00 hours. Thereafter he went to the Civil Hospital, Ahmedabad next day i.e. on 24-3-1998 and started recording the complaint around 8-00 a.m.

The prosecution also produced the report to register the offence at Exh.40. It indicates that on the basis of 'Vardhi' given by Head-Constable Bhupatsinh Hemtuji, of Kalol Taluka Police Station at 20-00 hours on 23-3-1998 compliant of Shakarabhai was recorded and was forwarded to register offence. It is very strange that though the information with regard to commission of cognizable offence was received at 20-00 hours on 23-3-1998 the complaint came to be recorded on 24-3-1998.

22. The prosecution examined P.W. 14 Nasirkhan Motekhan Pathan, who recorded the complaint at Exh. 37. The evidence of this witness indicates that he received order Exh. 38 for further investigation at 21-00 hours on 23-3-1998 and thereafter on 24-3-1998 he went to Civil Hospital, Ahmedabad and recorded complaint Exh.39. The evidence of this witness also indicates that the witness also received another order at 22-25 hours on the same day that Kacharabhai Mangabhai (the accused in this offence) has sustained injury in a scuffle is admitted in General Hospital, Gandhinagar, and to do necessary proceedings. Therefore, after recording complaint Exh.39 the witness went to General Hospital, Gandhinagar and recorded the complaint of Kacharabhai Mangabhai. The evidence

of P.W. 15 Firozkhan Alamkhan Exh. 42 indicates that P.W. 14 Nasirkhan forwarded two complaints at 13-30 hrs. on 24-3-1998 to him for registration of offence. It also indicates that the complaint of Shakarabhai Madhabhai was registered as I – C.R. No.76 of 1998 and the complaint of Kacharabhai Mangabhai was registered as II – CR No.98 of 1998. Report Exh. 43 indicates that after registration of the offence investigation was entrusted to Police Sub-Inspector Mr. Goswami of Kalol Taluka Police Station. This evidence clearly indicates that though first information with regard to the incident with details were given immediately after the incident by 'Vardhi' Exh.59 on 23-3-1998 complaint came to be recorded on 24-3-1998 at 8-00 a.m. and the offence came to be registered at 13-30 hours on 24-3-1998 i.e. after about 18-00 hours of the incident.

23. The prosecution examined complainant P.W. 4 Shakarabhai Madhabhai Prajapati at Exh. 25. The witness supported the allegations made in complaint Exh.39. The deposition indicates that the appellants and other accused came to his house around 5-00 p.m. on 23-3-1998 and appellant Bakabhai @ Dashrathbhai Kacharabhai and appellant Rajeshkumar Kacharabhai had axe in their hands, accused Kacharabhai had wooden log

and Bhikhabhai Mangaldas had stick in his hand. The deposition further indicates that the accused gave abuses and as the complainant requested them not to give abuses, therefore the accused got enraged and Bharatbhai ran towards the ward apprehending assault. It also indicates that the accused chased Bharatbhai and caused the injuries to him as well as to the complainant and Kamuben who intervened. It also transpires from the evidence that accused Kacharabhai's panshop was at the entrance of ward and the incident occurred at the entrance of the ward. The witness also admitted that about 15 to 20 persons assembled after the incident on account of shouting and there are residential houses near the place of the incident. The evidence also indicates that accused Kacharabhai had also filed a compliant against the witness in respect of the same incident.

24. Considering the above evidence, there is improvement in the oral deposition with regard to the place of incident. As observed earlier in the complaint it is alleged that appellants and other accused came to the house of the complainant and the incident ensued. Whereas in the oral deposition, the witness deposed that when the complainant, his wife Kamuben and son

Bharatbhai were at home the aggressors came with weapons giving abuses and therefore the complainant requested them not to give abuses, therefore the accused got enraged, hence deceased Bharatbhai ran towards the ward apprehending assault and all the accused chased him and appellant Bakabhai @ Dashrathbhai Kacharabhai gave him axe blows. This is material improvement in his evidence. As recorded earlier according to the prosecution case, the incident occurred at the house of the complainant Shakarabhai. But panchanama of scene of offence Exh. 68 and the map of place of incident Exh.52 indicate that the place of incident is near to the house of Joshi Ganda Lallu and away at distance of about 50 feet from the house of complainant Shakarabhai Madhabhai. The complainant also admitted that there is a panshop of accused Shakarabhai at the entrance of the ward and that the incident occurred at the entrance of the ward. In our view, this improvement is very significant. In 'Vardhi' Exh. 59 given by P.W. 22 Bhupatsinh which was the first information with regard to the incident, the complainant did not give the place of occurrence of the incident by giving fact that the accused came to the house. But thereafter, when complaint Exh. 39 came to be recorded after about 18 hours it was

categorically alleged that the appellants and other accused came to the house of the complainant with weapons but did not mention that Bharatbhai ran towards entrance of the ward and the accused chased him. Thereafter in the oral deposition the witness further improved by deposing that when they were at home the accused came with weapons and Bharatbhai ran towards the ward apprehending assault and the accused chased him. Considering the fact that there was considerable time between the occurrence of the incident and the recording of the complaint, in our view, the complainant took advantage of the situation and made improvement in the information given at the time of admission in the hospital. Thereafter further improvement was made in the oral deposition. Therefore, it is difficult to believe that the incident occurred near his house as alleged by the complainant. It is also very strange that the fact about running of Bharatbhai and chasing him by the appellants and other accused is not given in the complaint. As observed earlier, the complainant admitted that the incident occurred at the entrance of the ward which is contrary to the prosecution case with regard to the place of the incident. Therefore, it appears that in order to overcome this discrepancy, the complainant in his deposition improved his

version by deposing that deceased Bharatbhai ran towards the ward apprehending assault and the appellants and other accused chased him and appellant Bakabhai @ Dashrathbhai Kacharabhai caused fatal injuries. In view of this discrepancy, it becomes doubtful whether the incident occurred near the house of the complainant as alleged by the prosecution. In view of the fact that appellant Bakabhai @ Dashrathbhai Kacharabhai in his further statement admitted the incident, the prosecution case with regard to occurrence of the incident does not require much discussion. However, in view of the discrepancy with regard to the place of the incident, the defence raised by appellant Bakabhai @ Dashrathbhai Kacharabhai that Bharatbhai sustained fatal injuries as he moved round the axe to save his father and mother, is also required to be examined.

25. The prosecution examined P.W. 2 Dr. Amrutlal Lallubhai Patel at Exh. 17, who examined Bharatbhai Shakarabhai on his admission in General Hospital, Gandhinagar. According to the witness, injury No.1 on head was serious, whereas injuries No.2 and 3 were simple injuries. The witness also deposed that such injuries were possible by the muddamal axe. In the cross-examination the witness admitted that

injury no. 1 was possible on account of moving round of axe in fight between two groups. Injury certificate Exh. 18 indicates the injuries found on the body of deceased Bharatbhai. The prosecution also examined P.W. 1 Dr. Chandrakant Babalal Darji at Exh. 14 who performed the postmortem of dead body of Bharatbhai. According to the Doctor the injury on head was fatal injury and the injuries were possible by muddamal article axe. The postmortem report Exh. 15 indicates the external and internal injuries found on the dead body and the cause of death was due to shock due to haemorrhage due to head injury. In view of this evidence, it becomes clear that the injury caused on head of deceased Bharatbhai was possible on account of moving round of axe in free fight between two groups.

26. The prosecution examined P.W. 5 Ashokbhai Shakarabhai Prajapati, son of complainant Shakarabhai and brother of deceased Bharatbhai at Exh. 26. According to the witness, when he came to the house at about 5-00 to 5-15 p.m. his sister-in-law (Bhabhi i.e. Elder brother's wife) Shardaben informed him that his father, mother and Bharatbhai have been beaten and taken to Gandhinagar for treatment. The witness tried to demonstrate that he was not present at the time

of the incident but came after the incident was over. The witness gave details about the previous incident but did not depose about the incident in question. However P.W. 8 Dahyabhai Kacharabhai Exh. 30 has admitted that Ashok was present at the time of incident. Medical certificate Exh. 23 indicates that Ashok was admitted in the hospital at 8-45 p.m. If Ashok came home at 5-00 to 5-15 and was assaulted by the accused, it is very strange that he went to the hospital almost after 3 ½ hours of the incident. In our view, Ashok has denied his present at the time of incident only with a view to raise defence in the complaint filed against him by Kacharabhai. Therefore, in our view Ashok was present at the time of incident wherein Bharatbhai was fatally injured. It would not be misplaced to record that this witness in the further statement recorded in his case stated that as he could not get vehicle to go to hospital he reached at the hospital at about 10-00 p.m. but complainant and Kamuben in their deposition deposed that when they were being transferred to Civil Hospital, Ahmedabad, Ashok with injuries reached at Gandhinagar Hospital. As observed earlier the injured were transferred to Ahmedabad at 7-20 p.m. and Ashok was admitted in the hospital at 8-45 p.m. Therefore, the witness is not telling the truth but it becomes

clear that Ashok was present at the time of the incident wherein Bharatbhai was injured and there is 'panshop' of other accused Kacharabhai at the entrance of their ward.

27. The prosecution also examined injured P.W. 6 Kamuben Shakarabhai Prajapati, the wife of complainant Shakarabhai at Exh. 27. She deposed that the wooden log was at the entrance of the ward before two days of the incident and it was removed on the same day as the accused objected to putting up the wooden long. The witness also deposed that the incident occurred at the entrance of the ward and about 10 to 15 persons assembled at the place of the incident on account of shouting. The witness improved her version by deposing that deceased Bharatbhai ran towards the ward apprehending assault and all the accused chased him. In our view, the improvement in the oral deposition is made only with a view to suit the prosecution case with regard to the place of incident.

28. The prosecution also examined P.W. 7 Shardaben Keshabhai, the daughter-in-law of the complainant at Exh. 29. She deposed that she was present in the house with complainant Shakarabhai, Kamuben and Bharatbhai at the time of the incident. She also deposed that about 20

to 25 persons assembled at the place of the incident but she does not know their names. In our view, the witness did not give the names of the persons because she was not present in the house and witnessed the incident. Even the complainant P.W. 4 Shakarabhai and P.W. 6 Kamuben have also not stated that Shardaben was present in the house at the time of the incident. Therefore, in our view, deposition of this witness cannot be relied upon. However, one fact becomes clear that accused Kacharabhai had a 'panshop' at the entrance of the ward.

29. The prosecution also examined P.W. 8 Dahyabhai Kacharabhai Raval at Exh.30 who allegedly intervened in the incident. According to this witness, he was present in Raval Vas which is adjoining to the ward of the parties and he went there on hearing shouts at the entrance of Prajapati Vas. According to the witness there was scuffle and appellant Bakabhai @ Dashrathbhai Kacharabhai gave axe blows to deceased Bharatbhai. The witness admitted that at the time of incident P.W. 6 Kamuben was giving abuses and P.W. 5 Ashok was present. The evidence of this witness clearly indicates that the place of incident was at the entrance of Prajapati Vas and not near the house of the complainant and that P.W. 6 Kamuben also gave abuses and P.W. 7

Ashok was also present at the time of the incident.

30. The prosecution examined P.W. 10 Thaguji Nathuji at Exh. 32 the panch of panchanama of scene of offence and discovery of muddamal. The witness partly supported the prosecution case but was declared hostile with regard to discovery of weapons by appellant Bakabhai @ Dashrathbai Kacharabhai. According to the witness, the place where the blood was found was away at distance of about 150 feet from the house of Shakarabhai. The witness also admitted that there is 'panshop' of Kacharabhai who runs the 'panshop'.

31. The panchanama of scene of offence Exh.68 indicates that blood spots were found on the road going towards Prajapati Vas near the house of Gandabhai Lallubhai Joshi. It also indicates that the house of complainant Shakarabhai is at a distance of 50 feet from that place. This clearly indicates that the incident did not occur at the place alleged by the prosecution.

32. Now, on examination of the evidence it becomes clear that accused Kacharabhai Mangabhai had a panshop at the entrance of Prajapati Vas and the incident occurred at

the same place and not at the place where the prosecution alleges to have been occurred. The evidence also indicates that P.W. 6 Kamuben also gave abuses and P.W. 5 Ashok was also present at the time of occurrence. In view of the fact that complaint Exh. 41 was also filed by accused Kacharabhai against complainant Shakarabhai and others, it becomes clear that there was a quarrel and free fight ensued between two groups of people and complaints were filed for the incident. The prosecution also produced injury certificate of accused Kacharabhai at Exh.21 which indicates that he sustained injuries and was admitted in General Hospital, Gandhinagar at 6-30 p.m. on 23-3-1998. In view of the fact that injured persons from both the groups were admitted in the hospital between 6-15 p.m. and 6-30 p.m. it becomes clear that people from both the groups sustained injuries in the same incident. It is significant that the incident occurred at about 5-00 p.m. in a populated area and many people assembled after the incident. However, strangely except one witness, who is also family friend of complainant no statement of independent witnesses have been recorded. As observed earlier, the complainant and the witnesses are relatives, and therefore, exaggerated version by them with regard to the incident

cannot be ruled out.

33. In view of above, the evidence produced by the prosecution is not reliable enough to accept it wholly. As noticed earlier there is discrepancy with regard to the place of the incident and the manner in which the incident occurred. It is also pertinent that accused Kacharabhai had also filed a complaint Exh.41 against complainant Shakarabhai, deceased Bharatbhai injured Kamuben Shakarabhai and witness Ashok alleging assault by them at his 'panshop' between 5-00 p.m. and 5-30 p.m. on the same day. The present incident is also alleged to have occurred at 5-00 p.m. Therefore, in our view, the prosecution case that the appellants and other accused came to the house of complainant Shakarabhai and made assault is not wholly true. In view of the fact that appellant Bakabhai @ Dashrathbhai has not disputed the incident, it appears that there was a free fight between two groups at the entrance of the ward and not at the place alleged by the prosecution. According to P.W. 5 Ashok, he was not present at the time of assault by the accused but was beaten and injured by the accused when he returned home at about 5-00 or 5-15. The Medical Certificate of Ashok Exh. 23 indicates that he went to the hospital without

police 'yadi' at 8-45 p.m. The provision medical certificates of Bharatbhai Exh. 18 and Kamuben Exh. 19 indicate that they were shifted to Civil Hospital, Ahmedabad at 7-20 p.m. The Medical Certificate Exh. 21 indicates that accused Kacharabhai was admitted in the hospital at 6-30 p.m. P.W. 17 Dr. Amrutlal also deposed that Kacharabhai came to the hospital at 6-30 p.m. In view of this, it becomes clear that deceased Bharatbhai, injured P.W. 6 Kamuben and accused Kacharabhai were admitted in the hospital between 6-15 p.m. and 6-30 p.m., whereas P.W. 5 Ashok came to the hospital at 8-45 p.m. If we accept that P.W. 5 Ashok was assaulted in second incident, he would have also filed a complaint for the assault but no such complaint is filed. Moreover in the complaint filed by accused Kacharabhai Ashok was prosecuted in Sessions Case No. 64 of 1999 with other accused and was convicted. In the said case, in the further statement Ashok stated that he had used stick in self defence and that might have caused injuries to the member of family of complainant. Therefore, P.W. 5 Ashok admitted use of stick but allegedly in other incident. But as observed earlier on examination of the evidence, in our view, it cannot be accepted that two separate incidents occurred in immediate succession. Therefore, now the defence

that the act was done in exercise of private defence, put up by appellant Bakabhai @ Dashrathbhai is required to be examined.

34. The evidence indicates that on the previous day of the incident, there was quarrel between the family of the complainant and the family of the appellants about putting up a wooden log as complainant had put a wooden log which was objected to by the appellants and other accused. Therefore, it was removed by the complainant and on the next day the incident ensued. Looking to the place of the incident, it is difficult to accept that the appellants and other accused came to the house of the complainant armed with the weapons and attacked the complainant and his family members. The evidence also indicates that deceased Bharatbhai had in all sustained three injuries out of which one fatal injury was on head and two other were on forearm and back which were simple injuries. Had there been any intention on the part of the appellant Bakabhai @ Dashrathbhai to commit murder of Bharatbhai more fatal injuries would have been inflicted as according to the prosecution case, both the appellants were armed with the deadly weapons. As observed earlier, the Doctor has also opined that the injuries were possible on account of moving round an axe, in our view probability

cannot be ruled out that appellant Bakabhai @ Dashrathbhai was moving round the axe to save his father and in that process Bharatbhai sustained injuries.

35. The medical evidence indicates that one out of three injuries was caused on vital part like head of Bharatbhai. The defence is that appellant Bakabhai @ was moving round axe with a view to save his parents from attack by deceased Bharatbhai and others. Under Section 96 of the I.P. Code nothing is an offence which is done in the exercise of the right of private defence. However, such right is subject to certain restrictions. One of such restriction is that the harm inflicted in private defence must be not more than legitimately necessary for defence. The force used in private defence cannot be weighed in golden scale. As observed earlier on conjoint reading of evidence in this case as well as the evidence in Criminal Appeal No. 863 of 1999 filed by Ashok against his conviction, it becomes clear that there was quarrel between groups of complainant Shakarabhai and accused Kacharabhai wherein shouts were raised and on hearing the shouts appellant Bakabhai @ Dashrathbhai came to the place of the incident and started moving round axe with a view to save his father Kacharabhai.

This appears to be quite natural conduct. The evidence indicates that such right of private defence was exercised without premeditation. However, the nature of the injuries caused to Bharatbhai appears to be more than it was necessary for the purpose of defence. Looking to the nature of injury on head caused to deceased Bharatbhai, it was more than necessary in exercise of private defence. It is true that the appellant might not have anticipated that the injury would be caused on head and therefore it was not premeditated but in any case it was more than necessary. Therefore, appellant Bakabhai @ Dashrathbhai exceeded in exercise of private defence. In our view, appellant Bakabhai @ Dashrathbhai in exercise in good faith of right of private defence exceeded the power given to him by law and caused injury on head which resulted into death of Bharatbhai. The manner in which the incident occurred and looking to the injuries, it cannot be said that appellant Bakabhai @ Dashrathbhai caused the injuries with the intention to cause death. The evidence does not indicate that the act by which death was caused has done with the intention of causing death. Therefore, in our view, the case of appellant Bakabhai @ Dashrathbhai would fall under exception 2 to Section 300 of the I.P. Code and so the learned trial Judge committed

error in convicting appellant Bakabhai @ Dashrathbhai for the offence punishable u/s 302 of the I.P. Code. Looking to the evidence, in our view, the act of causing the injuries to Bharatbhai was done with the knowledge that such injury is likely to cause death but without any intention to cause death or to cause such injuries as is likely to cause death. Therefore, his conviction is required to be altered to Section 304 Part-II of the I.P. Code.

36. As regards sentence Mr. Desai learned advocate for the appellants submitted that appellant Bakabhai @ Dashrathbhai was arrested on 20-4-1998 and since then he is in jail. Therefore, the appellant has undergone imprisonment of 8 years and 9 months and therefore considering the period of imprisonment undergone by him such period be considered as just and adequate sentence. In our view, considering the period of imprisonment undergone by appellant Bakabhai @ is just, proper and adequate sentence for the offence punishable under Section 304 Part-II of the I.P. Code.

37. As regards conviction of appellant Rajeshkumar, according to the prosecution case, he caused injuries to P.W. 6 Kamuben Shakarabhai by axe. Injured Kamuben in her deposition stated

that appellant Rajeshkumar was holding axe and he inflicted axe blow on her right hand. The 'Vardhi' Exh. 59 indicates that appellant Rajeshkumar was holding stick in his hand. In view of this evidence, there is contradiction with regard to holding of nature of weapon by appellant Rajeshkumar.

38. The evidence of P.W. 2 Dr. Amrutlal Lallubhai Patel Exh. 17, who treated Kamuben in the hospital, indicates that the injuries were simple and were possible by hard and blunt object. The witness opined that such injuries were possible by other part except edged part of axe. Certificate Exh. 19 indicates that the injured had abrasion and C.L.W. on right forearm and tenderness on left temporal region. It is not the prosecution case that appellant Rajeshkumar caused injury to Kamuben by other part of axe. There is contradiction in respect of weapon held by appellant Rajeshkumar. Looking to the injuries, in our view, the injuries could not have been caused as alleged by the prosecution. Therefore, in our view, the learned trial Judge committed error in convicting appellant Rajeshkumar for the offence punishable under Section 324 of the I.P. Code.

39. The prosecution adduced evidence to prove

that death of Bharatbhai was homicidal in nature. In support thereof the prosecution examined P.W. 1 Dr. Chandrakanat Babalal Darji at Exh. 14 to prove the injuries. In view of the fact that the appellants have not disputed that death of Bharatbhai was homicidal in nature, no further discussion is required in that regard.

40. In view of above, the present appeal is required to be partly allowed. The conviction of appellant Bakabhai @ Dashrathbhai is required to be altered from Section 302 of the I.P. Code to Section 304 Part-II of the I.P. Code and is required to undergo sentence of imprisonment already undergone by him. However, the sentence with regard to the fine and compensation imposed by the trial Court is not required to be altered. The conviction of appellant Rajeshkumar Kacharabhai for the offence punishable u/s 324 of the I.P. Code is required to be set aside.

41. For the reasons recorded in the judgment, the present appeal is partly allowed. The conviction and sentence recorded against appellant No.1 Bakabhai @ Dashrathbhai Kacharabhai Prajapati vide judgment and order dated 31-7-1999 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No. 138 of 1998 for the offence punishable u/s

302 of the I.P. Code is altered from Section 302 of the I.P. Code to Section 304 Part-II of the I.P. Code and he is sentenced to undergo rigorous imprisonment for the period already undergone by him. However, the sentence of fine and compensation is confirmed and not altered.

42. The conviction and sentence recorded against appellant No. 2 Rajeshkumar Kacharabhai Prajapati vide the judgment and order dated 31-7-1999 passed by learned Addl. Sessions Judge, Mehsana in Sessions Case No. 138 of 1998 for the offence punishable u/s 324 of the I.P. Code is hereby set aside and he is acquitted for the offence punishable under Section 324 of the I.P. Code. Since he is on bail, his bail bond stands cancelled. The fine, if paid, be returned to the appellant No.2.

43. The muddamal be disposed of as directed by the trial court.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/